Supreme Court, U.S.
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No. 93-1308

In The

Supreme Court of the United States

October Term, 1993

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

The City of Lauderdale Lakes respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's judgment and opinion in this case. That opinion is reported at 997 F.2d 1369 (11th Cir. 1993).

STATEMENT OF THE CASE

A. THE PROPERTY IN DISPUTE

In 1966, 261 acres owned by HERMAN CORN, Trustee (CORN) were annexed into the CITY OF LAUDERDALE LAKES (CITY) by Ordinance No. 105. (TR

44-45).[1] The land had been acquired by CORN at a cost of less than $5,000 per acre. (TR 57, 194). The property which is the subject matter of this dispute (subject property) consists of an 8-1/2 acre parcel of land in the southeast corner of CORN's property. (TR 84).

At the time when CORN's land was annexed into the CITY, there were discussions between CORN and the City Council regarding the zoning classifications which would attach to various portions of CORN's property. (TR 64-67). All of CORN's property, with the exception of the subject property, was zoned either "R" (residential) or "B" (business). With regard to the subject property, CORN requested a "C" (commercial) designation.

In response to CORN's request, the subject parcel was zoned C-1A by the CITY pursuant to Ordinance No. 103. (*Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557, 1559 (S.D. Fla. 1991); App. B2). The "A" which was added to CORN's requested zoning classification of C-1 designated that the CITY was going to retain input into and control of the subject property's usage in light of its juxtaposition to the proposed residential development. (TR 461-462).

The subject property was bounded on the south by the C-13 Canal, a state waterway which was in existence at the time of the property's annexation into the CITY. (TR 59, 196). Immediately south of the C-13 Canal was a

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[1] References to the transcript of the trial proceedings before Judge Paine in the United States District Court for the Southern District of Florida (August 12-15, 1991) shall be designated "TR" followed by the appropriate page number.

municipal sewer plant which was also in existence at the time of the annexation of the property. (TR 59). The shape of the subject parcel was dictated by CORN's desire to maximize its profitability. (TR 62). The commercial zoning request was mandated by the undesirability of residential or business usage in such close proximity to a sewage plant. (TR 197-198). CORN expended funds in preparatory work on the C-1A property in conjunction with preparatory work done on the larger 261-acre parcel; no monies were expended on the C-1A property subsequent to the initial preparatory work for the ten-year period which preceded the submission of the preliminary site plan. (TR 80-85).

By 1975, most of CORN's 261 acres had been developed by CORN and his affiliated companies. No development had yet been proposed for the subject property. (TR 71-72). During 1975, the CITY retained the services of a planner to create a land use plan and certify its compliance with Broward County's Master Land Use Plan. (TR 526-527). By law, all municipalities within Broward County had to be in compliance with Broward County's Master Plan by November of 1977. (TR 466, 526-527). Throughout 1976 and early 1977, there were discussions at the City Council level regarding the propriety of commercial zoning in such close proximity to residential areas. (TR 465-468). The land use planner retained by the CITY had indicated that the juxtaposition of these two types of zoning was not consistent with good land use planning principles. (TR 527-528). Additionally, Mr. Scheingarten, Chairman of the CITY's Planning and Zoning Board, had independently recommended that the property which is the subject matter of this dispute be

rezoned from commercial to business usage. (*Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1376-77 (11th Cir. 1993); App. A15; TR 466, 566).

In April of 1977, prior to the City Council's initiating any definitive action to rezone the subject property, CORN submitted a preliminary site plan which called for the construction of a 67,000 square foot strip shopping center on the front portion of the property and a 900-unit, 103,000 square foot mini-warehouse storage facility on the rear portion of the subject property. (771 F.Supp. at 1560; App. B2-3). The preliminary site plans submitted by CORN were reviewed by the CITY in the ordinary course of government. The plans were routinely forwarded to the CITY's consulting engineer for review to determine their compliance with applicable ordinances. (TR 551).

There were various meetings of the Planning and Zoning Committee wherein CORN's plans for development were discussed. (TR 98). A number of changes were requested. (*Id.*). CORN complied with some of the requests and declined to comply with others, citing disagreements with the CITY's interpretation. (TR 211-218; 997 F.2d at 1377; App. A15-16). The Planning and Zoning Board eventually recommended on a 2-1 vote that CORN's preliminary site plan, as amended, be approved. (TR 571).

The matter then came before the City Council for approval of the preliminary site plan. Approval of the preliminary site plan was a prerequisite to the issuance of a building permit. A building permit could be obtained only after final site plan approval and after the submittal

of a set of construction drawings which complied with all applicable requirements. (TR 209-210).

The question of preliminary site plan approval for CORN's project was discussed at several City Council meetings. (TR 471-478). Members of the Council and members of the community expressed concerns with the proposed development. (TR 473-478). The specific concerns voiced were that this mini-warehouse development would adversely affect the property values of the residences across the canal, that it would destroy the residential character of the neighborhood, that it would adversely affect traffic in their neighborhood, that the peace and quiet of the neighborhood would be destroyed by trucks and vehicles coming to the warehouses in the early morning and late evening, and that it would represent a significant fire hazard. (*Id.*).

On July 12, 1977, approval of CORN's preliminary site plan again came up for vote after having been tabled on several prior occasions. (TR 479; 771 F.Supp. at 1560; App. B3). At that meeting, the CITY passed on first reading Ordinance No. 548 which eliminated, among other things, mini-warehouses as a permissible use under a C-1 zoning classification. (TR 483-484). The CITY also passed on first reading Ordinance No. 549 which rezoned CORN's land from C-1A to B-3. (*Id.*). The ordinances were not enacted at that time. Public hearings were held on Ordinances Nos. 548 and 549; they actually became law in September of 1977. (TR 485; 997 F.2d at 1371; App. A2-3). During the July 12, 1977 meeting, the Council voted to deny CORN's preliminary site plan because the plans he had submitted were deficient as to parking, fire protection and landscaping. (TR 488-489, 555-558). CORN

never applied for a building permit and one was never issued. (TR 226).

On July 19, 1977, the CITY passed Ordinance No. 552 which called for a 150-day moratorium on all construction on all C-1 property within the CITY boundaries. (TR 489; 997 F.2d at 1371; App. A3). At the expiration of the 150-day period, the moratorium was extended by an additional 180-days by Ordinance No. 568 at which time it expired by its own terms. (TR 498). During the pendency of the moratorium, land use planning experts retained by the CITY as well as departments within the CITY rendered reports recommending against allowing commercial development on properties zoned C-1 within the CITY. (TR 490; 997 F.2d at 1384-85; App. A35-36).

The effect of the legislation enacted by the CITY was to prevent all construction on the subject property until July 4, 1978. Thereafter, CORN was free to develop the property in any manner consistent with the business zoning. (771 F.Supp. at 1572; App. B29). The strip shopping center which made up the front portion of CORN's proposed development was a permitted use under the business zoning classification. (*Id.*). There was no opposition to the construction of the shopping center which was the front portion of the project; the controversy concerned the mini-warehouse complex planned for the rear. (TR 233-234). Despite this, CORN never submitted any plans for the development of the shopping center subsequent to the expiration of the moratorium in July of 1978. (TR 227, 236).

B. THE STATE LITIGATION

Subsequent to the initiation of the referenced legislation, CORN instituted state court litigation on August 11, 1977, challenging both the validity of Ordinances Nos. 548, 549 and 552 and the CITY's refusal to approve his preliminary site plans. (997 F.2d at 1371; App. A3).

CORN set forth five causes of action in his state court complaint: Petition for Writ of Mandamus (Count I); Declaratory Judgment (Count II); Inverse Condemnation (Count III); Prior Determination (Count IV); and Injunctive Relief (Count V). (771 F.Supp at 1561; App. B4). The claim for inverse condemnation (Count III) was dismissed prior to the state court trial. (*Id.*). The matter was tried in 1978 and final judgment ("the state court final judgment") was rendered by the state trial court in October of that year.[2] The actual holding of the state trial court was that the CITY was equitably estopped to change the zoning because CORN had established vested rights in the subject property. (App. G18-19). Contrary to CORN's assertion, there was no holding by the state trial court that the CITY was estopped to change the zoning on the C-1A property by any prior state court proceeding.[3]

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[2] The final judgment of the state trial court from the 1977 action is set forth in the appendix as G1-20. The appendix is identified as the next letter after CORN's appendix which the CITY adopts as a joint appendix for purposes of its Brief In Opposition.

[3] CORN, in an attempt to characterize the CITY's actions in 1977 as "illegal," erroneously implies that the CITY's actions were somehow violative of a prior 1969 state court ruling. (CORN's Petition at 5). A review of the actual judgment of the trial court shows that such was not the case. (App. G15).

Pursuant to the state court final judgment, CORN's preliminary site plans were found to contain three deficiencies violative of codified regulations concerning the adequacy of parking, fire protection and landscaping. However, Ordinances Nos. 548, 549 and 552 were ruled invalid as applied to CORN and his property and the CITY was directed to approve CORN's preliminary site plans upon their resubmission in proper form. (App. G19).

The judgment of the state trial court was affirmed by Florida's Fourth District Court of Appeal in February 1983. (427 So.2d at 244; App. D11). The appellate court found that although an owner of property acquires no vested rights in the continuation of existing zoning under Florida law, CORN had relied in good faith on the zoning and had made substantial change in the nature and contour of the land and had expended considerable sums of money so as to equitably estop the CITY from a change in zoning. (427 So.2d at 243-44; App. D8-9).

The mandate of the Fourth District Court of Appeal was issued on March 4, 1983. (771 F.Supp. at 1561; App. B5). CORN did not resubmit a preliminary site plan which complied with the directives of the final judgment until October of 1983, a period of seven months following

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Moreover, CORN attempted to make this same argument in the subsequent state court appeal. The Florida appellate court specifically set forth that they were not addressing CORN's claim that the 1969 state court ruling established any estoppel which would bar a change of zoning on the subject property. (*City of Lauderdale Lakes v. Corn*, 427 So.2d 239, 244 (Fla. 4th DCA 1983); App. D11).

issuance of the mandate. (TR241; 771 F.Supp. at 1561; App. B5). At that time, CORN was advised that it would be necessary for him to plat the property in order to comply with County, not CITY, requirements. (TR 595). CORN then did nothing for a period of another year until he filed suit in Broward County Circuit Court seeking a judicial decree that he did not have to comply with any County ordinances which were not in existence in 1977. (TR 596-597; 771 F.Supp. at 1571; App. B27). The action was unopposed by the CITY. (TR 597). CORN obtained the relief he requested but chose not to build the project and instead proceeded with a federal court action. (TR 181, 183).

C. THE DISTRICT COURT LITIGATION

CORN filed his federal action against the CITY in 1984. (771 F.Supp. at 1561; App. B5-6). Although the complaint included a claim for denial of procedural due process under the Fourteenth Amendment, that claim was abandoned by CORN prior to trial. (771 F.Supp. at 1562; App. B7). The case proceeded to trial as a 42 U.S.C. §1983 action on CORN's claims that the CITY had "taken" his property without just compensation in violation of his Fifth Amendment rights and that the CITY had deprived him of his substantive due process rights in violation of the Fourteenth Amendment. (*Id.*). CORN took the position at the federal court trial that the violation of his substantive due process rights had been established by the 1977 state court litigation. (771 F.Supp. at 1568; App. B20). The district court analyzed what had been tried in the state court litigation and determined that the state court final judgment would have no preclusive effect on

the issue of whether the CITY's actions were arbitrary and capricious. (771 F.Supp. at 1568-69; App. B21). The district court went on to find that the CITY had acted arbitrarily and capriciously and had deprived CORN of a constitutionally protected property interest and therefore had violated his substantive due process rights. (771 F.Supp. at 1569; App. B21-23). The court did not make a determination of whether CORN's Fifth Amendment rights had been violated. (771 F.Supp. at 1569; App. B23).[4]

On the question of damages, the court reviewed the evidence presented by CORN and the CITY in light of the parameters set forth in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990) (*Wheeler IV*). The court entered judgment in favor of CORN in the amount of

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[4] The district court reasoned that because the measure of damages was the same for either a violation of CORN's Fifth or Fourteenth Amendment rights, it did not need to decide the Fifth Amendment claim having already decided the case favorably to CORN on the Fourteenth Amendment claim. (771 F.Supp. at 1569-70; App. B23). Subsequent to the issuance of the district court opinion, CORN filed a motion to amend and alter findings of fact and conclusions of law and final judgment and supporting memorandum of law. (R. 210). CORN's motion urged the court to decide the just compensation claim. (R. 210 at 12). The district court, in its order on plaintiff's motion (App. H1-4) stated that "the court determined that, as to the front portion of the Property, CORN regained all his sticks in the 'bundle of rights commonly characterized as property.' This determination necessarily means that the CITY had not 'gone too far' or taken CORN's property, thus requiring just compensation." (App. H3) (citation omitted). The Eleventh Circuit cited this language in its opinion (997 F.Supp. at 1393, fn. 3; App. A56) with regard to whether on remand the trial court could rule on the Fifth Amendment claim without the presentation of additional evidence.

$727,875.02. CORN, not satisfied with this amount, appealed the judgment as inadequate. The CITY cross-appealed the determination that it had violated CORN's Fourteenth Amendment substantive due process rights.

D. THE ELEVENTH CIRCUIT APPEAL

The Eleventh Circuit opinion held that the trial court erred as a matter of law in its determination that the CITY had violated CORN's Fourteenth Amendment substantive due process rights and, consequently, reversed the finding of liability (997 F.2d at 1371; App. A1). CORN's claim that the trial court had erred in its damage determinations was rendered moot by the reversal. (*Id.*).

The holding of the Eleventh Circuit was extremely narrow. Initially, the court found that the trial court had properly analyzed CORN's substantive due process claim in light of the holding of *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir. 1985). The court, quoting *Rymer*, stated:

> the current test in this circuit as to whether there has been a violation of substantive due process in the context of §1983 is twofold. First it must be determined whether there has been a deprivation of federally constitutionally protected interests, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation.

997 F.2d at 1374; App. A9.

The court noted that the two components of the substantive due process test are conjunctive and a reviewing court finding an absence of one component

need not decide whether the other exists. (997 F.2d at 1374; App. A10). The decision of the district court was reviewed in light of these principles.

The court focused on the second prong of the *Rymer* test which it interpreted as requiring an assessment of whether the actions of the CITY in denying CORN's preliminary site plan and changing the zoning were arbitrary and capricious. The court noted that the ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the court. (997 F.2d at 1373; App. A6). The court went on to hold that the proper inquiry into whether or not the CITY had acted arbitrarily and capriciously in a zoning context was whether the CITY's action had a rational relationship to a legitimate general welfare concern. (997 F.2d at 1388; App. A44). The Eleventh Circuit then reviewed the district court's factual findings and found that the evidence introduced at trial established that the CITY's actions had a rational relationship to a legitimate general welfare concern and to the extent the district court found otherwise, those findings were "clearly erroneous."

In light of its holding, the Eleventh Circuit reversed the decision of the trial court[5] and remanded the action to

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[5] The court also reversed the trial court's prior dismissal of the city council members on the basis that they were entitled to absolute legislative immunity insofar as their actions involving denial of the site plan were concerned but affirmed the trial court's prior dismissal of the city council members on the basis that they were entitled to absolute legislative immunity insofar as their actions involving the adoption of the ordinances were concerned. (997 F.2d at 1393; App. A56-57). This holding is not implicated in the present petition.

the district court with directions to consider CORN's Fifth Amendment claim upon which the trial court had previously declined to rule.[6]

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE WRIT SHOULD NOT ISSUE BECAUSE THE CIRCUIT COURT OF APPEALS DECISION DOES NOT CONTRAVENE ANY DOCTRINE OF COMITY, FULL FAITH AND CREDIT, OR PRECLUSION AND IS BASED UPON PROPER APPLICATION OF THE APPROPRIATE STANDARD OF REVIEW AS ENUNCIATED BY THIS COURT.

A. THE STATE COURT DETERMINATION THAT THE CITY IS EQUITABLY ESTOPPED FROM DENYING A PRELIMINARY SITE PLAN AND CHANGING EXISTING ZONING BECAUSE CORN HAS ESTABLISHED VESTED RIGHTS IS NOT A DETERMINATION THAT THE CITY HAS VIOLATED CORN'S CONSTITUTIONAL RIGHTS.

1. Nothing Cited By The Eleventh Circuit Does Violence To CORN's State Court Final Judgment.

The state court final judgment secured by CORN granted him the relief he sought. Specifically, CORN was granted the right to have his preliminary site plan approved and the right to build his project (G19-20).

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[6] Initially, pursuant to motion by CORN, the Eleventh Circuit stayed their mandate. Subsequently, however, the mandate was issued and judgment entered for the CITY on CORN's substantive due process claim. (App. I).

CORN has had that right since 1985 (997 F.2d at 1372; App. A3). CORN has that right today. The Eleventh Circuit opinion did not hold that the CITY could withhold approval of the preliminary site plan or change the zoning of the property. It merely held that there was a rational basis for the actions of the CITY and, as such, CORN had failed to prove a violation of his substantive due process rights. Any suggestion that the decision by the Eleventh Circuit "threatens to destabilize the clearly defined mode of interaction between federal and state trial and appellate courts" is specious.

2. CORN Tries Again To Boot Strap The Favorable State Court Final Judgment Into A Preclusive Finding Of Liability In His 42 U.S.C. §1983 Action.

At trial CORN sought to establish his liability claim under 42 U.S.C. §1983 by asserting the preclusive effect of the state court final judgment. The district court judge rejected this claim holding that collateral estoppel did not apply. (771 F.Supp. at 1568-69; App. B21). Now, CORN again attempts to argue that the state court final judgment which found that CORN had vested rights in the subject property entitles him, as a matter of law, to a determination that his constitutional rights have been violated. CORN is still wrong.

The state court final judgment determined CORN's "vested rights" in the subject property. Under Florida law, the concept of vested rights has been described as a theory of estoppel which amounts to nothing more than application of the rules of fair play. One party will not be

permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. *Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571, 573 (Fla. 2d DCA 1975).

The concepts of "vested rights" and "equitable estoppel" are inextricably linked. Indeed, it is well established that:

> An owner of property acquires no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against the zoning authority have arisen.

City of Gainesville v. Cone, 365 So.2d 737, 739 (Fla. 1st DCA 1979), citing *City of Miami Beach v. 8701 Collins Avenue*, 77 So.2d 428 (Fla. 1954). The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 15-16 (Fla. 1976). As the equitable estoppel test indicates, it is the actions of the property owner, not the zoning authority, which are crucial to a determination of the existence of vested rights. The absence of any arbitrary and capricious conduct by the zoning authority is no defense to a vested rights action.

The state court concluded that CORN had made "such a substantial change in position in reliance upon

the provisions of Ordinances #103 and #105 that it would be inequitable now to permit the City to strip Plaintiff of such rights by virtue of a re-zoning of the property." App. G14. The court further found that CORN had "certain vested rights in the zoning classification C-1A" and that the CITY was "estopped to deny Plaintiff's rights in such zoning classification." App. G18-19.

In stark opposition to a vested rights claim, to succeed upon his substantive due process claim, CORN was required to prove that "the City's actions in blocking development were arbitrary and capricious, lacking an adequate public purpose." 771 F.Supp. at 1568; App. B20. This test makes the actions of the zoning authority, not the property owner, the crux of substantive due process inquiry.

The district court recognized the disparate focus of the state and federal cases:

> The State Court Action concerned vested rights and equitable estoppel, which focus on the conduct of the landowner, not the governmental entity; the theory of vested rights overrides even a valid exercise of the zoning power. Any discussion of the public health considerations underlying Ordinances 548, 549, and 552 appears to be mere dictum.
>
> . . .
>
> Because CORN has not proven that the issue of public purpose was central to the [State Court] Final Judgment, collateral estoppel does not apply.

771 F.Supp. at 1569; App. B21 (citations omitted).

The state court's inquiry focused upon CORN's reliance upon the pre-existing ordinances, not upon the potentially arbitrary and capricious nature of the CITY's actions in denying site plan approval and in rezoning a portion of CORN's real property. The question of arbitrary and capricious action by the CITY was not a "necessary and material" issue actually decided in the state court action; consequently, the CITY was not estopped from litigating the substantive due process liability issue in federal court.

B. THE CIRCUIT COURT OF APPEALS DECISION IS NOT BASED UPON APPELLATE FACT FINDING, BUT RATHER UPON A PROPER APPLICATION OF THE APPROPRIATE STANDARD OF REVIEW AS MANDATED BY THIS COURT'S DECISIONS.

In reviewing the legal question of whether the CITY's actions were arbitrary and capricious, the issue is not merely whether the trial court's factual determinations were clearly erroneous; rather, the issue is, assuming all factual findings of the court to be correct unless clearly erroneous, and further reviewing the entire record in the light most favorable to CORN, did the trial court err as a matter of law in deciding that the City Council had no rational basis upon which to base a rezoning of CORN's property. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578-80 (11th Cir. 1989).

The court below independently reviewed the district court's conclusions of law. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Notably, the Eleventh Circuit found that the district court had applied an erroneous

constitutional standard to the arbitrary and capricious determination. (997 F.2d at 1388-89; App. A44-46).

The Court of Appeals below did not improperly divest the district court of its function as finder of fact. The Court of Appeals appropriately applied the "clearly erroneous" standard of review as defined by this Court and followed by the Eleventh Circuit. In 1948, this Court provided the now universally-adopted definition of the "clearly erroneous" rule:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, ___, 113 S.Ct. 2264, 2279 (1993); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

The Court of Appeals below cited the above cases as well as *United States v. Roy*, 869 F.2d 1427, 1429 (11th Cir. 1989), *cert. denied*, 493 U.S. 818 (1989) as establishing the standard of review which it then applied to the district court's findings regarding the CITY's actions. The court reviewed all of the evidence presented at trial, detailed the facts relevant to the substantive due process issue (*see* 997 F.2d at 1376-85; App. A14-37), and was left "with the definite and firm conviction that the district court was mistaken not to find the City's actions were motivated by and substantially related to general welfare concerns

about congestion, noise, traffic, aesthetics, safety, property value and the like." 997 F.2d at 1386; App. A39. The court went on to note that:

> What counts is . . . the motivation for the earlier action adopting the rezoning ordinance and denying the site plan. In respect to those actions, the evidence is overwhelming and undisputed. Indeed, most of it comes from public records, the minutes of official meetings which were admitted at trial without objection. That evidence uniformly and overwhelmingly establishes that the opposition to Corn's 900-unit mini-warehouse project was based on general welfare concerns of City officials and citizens alike. The evidence shows how those general welfare concerns were expressed to the City Council in a series of public hearings at which both sides were heard. The evidence also establishes that the City Council members became convinced that the project was incompatible with the best general welfare interests of the City and acted accordingly in a rational manner. The evidence is not subject to any other plausible explanation. The district court's contrary fact finding is clearly erroneous.

997 F.2d at 1386; App. A39-40.

Based upon the district court's clearly erroneous findings of fact and erroneous legal conclusions, the Eleventh Circuit below appropriately reversed the district court and found that the CITY's actions did not violate CORN's substantive due process rights. (997 F.2d at 1392-93; App. A53, 56-57).

II. THE WRIT SHOULD NOT ISSUE BECAUSE THE SUBSTANTIVE DUE PROCESS TEST FORMULATED BY THE ELEVENTH CIRCUIT IN THE CONTEXT OF LAND USE CASES AND UTILIZED BY THE COURT OF APPEALS BELOW IS WHOLLY CONSISTENT WITH THE TEACHINGS OF THIS COURT.

The Petitioner's federal complaint pursuant to 42 U.S.C. §1983 alleged a Fifth Amendment inverse condemnation claim and a Fourteenth Amendment substantive due process claim. Thús, the Petitioner's complaint, rather than the Eleventh Circuit below, provided the framework for the Circuit Court of Appeals' analysis of the alleged constitutional violations.[7]

The Eleventh Circuit followed the dictates of this Court in formulating its test for determining violations of substantive due process in the zoning context. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), this Court first announced that:

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[7] In his petition, CORN erroneously asserts that the Eleventh Circuit's decision in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991), provided the construct which was central to the disposition of this case by the court below. (CORN's Petition at 24-25). However, the so-called *Eide* construct was not dispositive of the Eleventh Circuit's inquiry below. Recognizing that CORN's complaint set forth a substantive due process claim, the court below limited its inquiry to whether or not the CITY's zoning actions were "arbitrary and capricious" as that term was defined by this Court as early as 1926. *See* discussion of this Court's substantive due process precedent, *infra*. The "arbitrary and capricious" standard, not the *Eide* construct, was therefore dispositive of this case. (997 F.2d at 1374; App. A10).

> [I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Two years later, the Court relying upon the *Euclid* opinion held that:

> [A] court should not set aside the determination of public officers in such a matter [municipal zoning] unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928). *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (Developer has a "right to be free of arbitrary and irrational zoning actions.").

Through a series of cases and following the mandate of this Court's aforementioned precedent, the Eleventh Circuit established a test for determining the existence of a substantive due process violation. The *Rymer* court enunciated a conjunctive two-prong test in 1985:

> First, it must be determined whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation.

Rymer, 764 F.2d at 801. The court, recognizing that substantive due process protects a general right of an individual to be free from the abuse of governmental power, advised that the "key inquiry is the second prong of the test." *Id.* at 802, footnote 4.

> A deprivation is of constitutional stature if it is undertaken for improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis. In the zoning context, the issue is whether the [zoning authority's] action bore any substantial relation to the public welfare.

Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 55 (1991), citing *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989). *See also Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989).

The Eleventh Circuit has consistently adhered to the dictates of this Court in its approach to substantive due process challenges in a zoning context. In light of the Eleventh Circuit's strict adherence to precedent, there is

no important question of federal law which needs to be settled by this Court.[8]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: March 18, 1994.

Respectfully submitted,

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[8] The Eleventh Circuit's finding of no liability on CORN's 42 U.S.C. § 1983 substantive due process claim rendered moot CORN's claim that the damages awarded by the trial court were inadequate. Despite the Eleventh Circuit's correct finding in this regard, CORN seeks certiorari on the question of whether damages were properly determined by the federal district court. CORN's Petition at 28-29. In light of the fact that the Eleventh Circuit below never even addressed the issue of the appropriate measure of damages in this case because it appropriately determined that no damages were warranted, this case does not provide the appropriate forum for this Court to make a general pronouncement regarding the proper measure of damages in a takings context.

APPENDIX G

FINAL JUDGMENT

THIS CAUSE came before the Court on the Plaintiff's Amended Complaint having been filed heretofore; and the Court having considered the allegations made in said Complaint, the defenses raised thereto and having heard the evidence presented by the parties in a non-jury trial conducted over a three-day period, including the position provided to the Court by the Amicus Curiae, Topaz South Condominium Association, Inc., renders this, its Final Judgment, and concludes as follows:

This dispute involves the Plaintiff's contention that the Defendants have improperly prohibited the development of a portion of its land previously zoned by the City of Lauderdale Lakes under the classification of C-1A, and further, that the City of Lauderdale Lakes has improperly re-zoned the property in question.

The facts presented indicate that in June, 1966, the City Council of Lauderdale Lakes passed Ordinances #103 and #104. Ordinance #103 provided for the zoning category C-1A within the City of Lauderdale Lakes and provided for the submission of site plans to the City Council for a review in conformity with the provisions of Ordinance #103, prior to the issuance of a building permit. Ordinance #104 was the action of the City Council which annexed the 261 acres which contains the property in question in this litigation.

On July 12, 1966, the City of Lauderdale Lakes did pass Ordinance #105, which specifically applied the zoning classification C-1A to the specific property involved herein, which, generally speaking, is that portion of the 261 acres annexed into the City lying immediately west of

State Road 7 and immediately north of the C-13 canal. (The legal description of the property in question being contained in the pleadings filed herein) [sic]. Subsequent to the action of the City Council on July 12, 1966, the Plaintiff, in accordance with the previously-approved overall plan, undertook to develop the property in question.

The evidence presented in this case indicates that the Plaintiff's efforts were in accordance with the development plan submitted to and approved by the City, and further, that the entire cost of the initial land development was borne by the Plaintiff. These costs included, but were not limited to, land clearing, demucking, filling and grading of the land and the construction of a system of canals and waterways throughout the 261-acre parcel of land. This system of canals and waterways specifically included the canal known as the C-13 canal, which separated the C-1A property from other residentially-zoned acreas [sic] within the 261 acres.

Thereafter, the Plaintiff proceeded to develop the residential portions of the 261 acres in accordance with the previously referred to development plan. In 1969, a disagreement between the Plaintiff and Defendants took place with reference to a proposed development on that portion of the 261 acres which were zoned R-4A. This dispute was considered in Case Number 69-6829, which was assigned to and heard by the former member of this Court, Circuit Judge John Moore, II.

On January 28, 1970, pursuant to a Motion for Summary Judgment, the said Judge John Moore entered his Order, which, in effect, estopped the City of Lauderdale

Lakes from changing the zoning classification assigned to the property in question in that litigation and nullified the City's attempts to change the zoning of the property.

The evidence further establishes that the Plaintiff in this cause has expended in excess of $100,000.00 in preparing the C-1A property to be developed in accordance with the previously-approved Ordinances #103 and #105. These sums were expended in reliance upon the City's action with reference to the assignment of the C-1A classification to the property in question. They would have not been expended had it not been for the action of the City in designating the property under the zoning classification of C-1A.

Ultimately, a proposed set of preliminary site plans was devised on behalf of the Plaintiff proposing the construction of a small shopping center on the eastern-most portion of the C-1A property and for the construction of a mini-warehouse complex on the western-most portion of the C-1A property.

By Ordinance #455, Section 1, adopted May 13, 1975, the City of Lauderdale Lakes has adopted the Broward County Zoning Classifications, Restrictions and Regulations, subject to certain amendments thereto not applicable to these proceedings. Section 3.41(6) of the Broward County Zoning Classifications specifically provides that a developer may submit preliminary site development plans for review by the appropriate site plan review committee for planning and zoning officials.

Section 6-45 of the City Code of the City of Lauderdale Lakes further provides for the submission of site plans for preliminary approval by the City Council. This

same Ordinance further provides for the submission of eight (8) copies of proposed site plans to be filed with the City Clerk, who shall thereafter distribute a copy of the site plans to the following officials of the City of Lauderdale Lakes:

(a) The Chief Building Official;

(b) The City Engineer or Consulting Engineers;

(c) The Police Department;

(d) The Fire Department;

(e) The Public Works Department, and

(f) The Planning and Zoning Board.

Following review by the foregoing officials, the site plans are to be brought before the City Council for preliminary approval, at which time, recommendations of the reviewing officials are presented to the City Council. Following preliminary approval, site plans may be amended in accordance with recommendations of the City Council and thereafter submitted for a final approval by the City Council. Disapproval of site plans under the Ordinance contemplates a revision by the applicant.

The City of Lauderdale Lakes has also adopted Section 6-21 of the City Code, which adopts the Broward County Edition of the South Florida Building Code, together with all amendments thereto, subject to certain amendments not pertinent to these proceedings. By this Ordinance, all buildings constructed within the City must conform to the construction standards contained therein.

Among the Broward County Zoning Regulations adopted by the City of Lauderdale Lakes is Section 9.3 of

the Broward County Regulations adopted by the City of Lauderdale Lakes is Section 9.3 of the Broward County Regulations relating to off-street parking, which contains the following minimum parking space requirements pertinent to these proceedings:

> "23. Manufacturing and industrial uses, research and testing laboratories, bottling establishments, printing and engraving shops, warehouses, motor vehicle sales rooms, wholesale stores, laundries and storage buildings, provided that exterior off-street areas adjacent to overhead doors may be utilized for required off-street parking for warehouses and storage buildings only: 1 parking space for each 600 square feet of floor area of the building.
>
> 23. For the purpose of this article, floor area shall mean the gross floor area inside of the exterior walls * * * ."

The City of Lauderdale Lakes has also adopted, among others, Section 3-1.1.10 of the National Fire Code, which provides in pertinent part that:

> "All premises which the Fire Department may be called upon to protect in the case of fire and which are not readily accessible from public roads shall be provided with suitable gates, access roads, and fire lanes, so that all buildings on the premises are accessible to fire apparatus. Fire lanes shall be provided for all buildings which are set back more than 150 feet from a public road or exceed 30 feet in height and are set back over 50 feet from a public road. Fire lanes shall be at least 20 feet in width with the road edge closest to the building at least 10 feet from the building. When any combination of

> private fire protection facilities, including but not limited to, fire resistive roofs, fire separation walls, space separation and automatic fire extinguishing systems, are provided and approved by the Fire Marshal as an acceptable alternate, Section 3-1.1.10 shall not apply."

Among the Broward County Zoning Regulations adopted by the City of Lauderdale Lakes is Section 3.41(9)(b), which provides as follows:

> "The main building line of all structures shall be a minimum of five (5) feet from the closest point of all parking areas."

Section 6-42 of the City Code of Lauderdale Lakes provides for the review of site plans. It establishes that such plans are first to be examined by the chief building official, the office of the City Engineer, or consulting engineers, the police department, the fire department, the public works department and the Planning and Zoning Board and that each of these officials or agencies shall review proposed site plans:

> "with respect to the compliance of such site plans with the regulations thereto appertaining, including, but not limited to, regulations of zoning, building subdivision, landscaping, and traffic flow and impact. Those agencies, offices and individuals named herein shall examine such site plans and shall make recommendations, in writing, to the City Council as to whether or not such site plans should be approved by said City Council. In the event any one of such agencies, offices and/or individuals recommend disapproval of a site plan, the reasons therefore shall be stated with specificity and, where applicable, the law, rule and/or regulation upon which

such disapproval is based shall be delineated. The City Council shall consider such recommendations as advisory in nature and, after such examination, shall approve or disapprove such site plans; provided, however, that no building permit shall be issued until the site plan pertaining thereto, when required, shall have been approved by the City Council."

The foregoing Ordinance provision, which was initially adopted in August, 1973, and amended in December, 1976, is supplementary to the provisions of Ordinance #103.

All of the foregoing Ordinances were in force in April, May, June and July, 1977

On April 1, 1977, Plaintiff submitted eight (8) sets of preliminary site plans to the City of Lauderdale Lakes by delivering them to the City Clerk, who thereafter distributed copies to the various officials described in paragraph 46 above.

On April 28, 1978, Plaintiff tendered and paid the required fee for site plan review.

Prior to any formal meetings of the Planning and Zoning Board, Plaintiff's site plans were considered in the workshop session by the Planning and Zoning Board, during which sessions, the officials of the Planning and Zoning Board made various suggestions and recommendations for changes on the preliminary site plans which Plaintiff; architect, Joseph Phillips; and Harold Augustine, engineer, proceeded to adopt and make.

Thereafter, the preliminary site plans were considered at a formal meeting of the Planning and Zoning

Board on April 28, 1977, which was ultimately continued on May 2, 1977, and concluded on May 12, 1977.

In response to the circulation of the preliminary site plans, and after a review of same, the Fire Chief of the City of Lauderdale Lakes submitted three reports to the City Clerk, which were reviewed by the Planning and Zoning Board during their consideration of the site plans. In the first report, dated April 13, 1977, the Fire Chief's comments dealt solely with the location, size and configuration of fire hydrants and water mains. His comments indicate a concern with the sufficiency of water flow in fighting any fire at the warehouse site. In his second report of April 29, 1977, the Fire Chief indicated a rejection of the revised plans because they did not contain an additional fire hydrant which he had suggested. In this letter, he did note, however, that the water mains had been correctly sized. In his final communication, dated May 12, 1977, the Fire Chief of the City of Lauderdale Lakes unequivocally approved the site plans as revised. In this letter, the Fire Chief noted the comments of the City's Consulting Engineers, and indicated that the Fire Chief had reviewed the revised site plans on May 11, 1977, submitted by Plaintiff's engineer.

By letter dated April 5, 1977, the Building Official of the City of Lauderdale Lakes indicated no objection to the site plans, and recommended that a fence be erected around the perimeter of the property on all sides abutting waterways.

By a letter dated April 14, 1977, the Superintendent of Public Works of the City of Lauderdale Lakes found no

discrepancies in the site plans and recommended their approval.

The Police Department of the City of Lauderdale Lakes voiced no objections to the site plans. By a letter dated April 15, 1977, nine recommendations were made which dealt with traffic flow, parking provisions and police access to the warehouse area.

With respect to a review of the site plans by the City's consulting engineers, three separate letters from the firm of James M. Montgomery, Consulting Engineers, Inc., dealt with engineering recommendations. In the first letter dated April 14, 1977, the consulting engineers did not specifically recommend approval, but rather pointed out ten areas of comment. Following this letter of April 14, Plaintiff made several changes and amendments to the proposed site plans in accordance with suggestions at the workshop sessions of the Planning and Zoning Board. These revised plans were then reviewed by the City's Consulting Engineers, who, by a letter dated May 6, 1977, raised seven areas of commentary without approving or disapproving the proposed plans. Plaintiff's engineer responded to the May 6 letter by a letter dated May 11, 1977, which appeared to satisfy all but two of the areas of commentary. The two areas of commentary not covered by Plaintiff's engineer dealt with the parallel parking design within the mini-warehouse area and the "layout" of the mini-warehouse area in relation to fire protection.

The Planning and Zoning Board of the City of Lauderdale Lakes, by a letter dated May 12, 1977, formally recommended approval of Plaintiff's preliminary site plans.

Subsequently, and at the request of the City Council, the Planning and Zoning Board again considered the proposed site plans at a public meeting held on May 26, 1977. The primary focus of this meeting was concerned with the layout of the mini-warehouse area and the access of fire-fighting apparatus and equipment. The Board fully considered all of the evidence discussed in the foregoing paragraphs and voted, with one member dissenting, again to recommend approval. By a letter dated May 27, 1977, the Planning and Zoning Board re-affirmed its recommendation contained in the letter of May 12.

From this point, Plaintiff sought to have his preliminary site plans considered by the City Council of Lauderdale Lakes in accordance with the provisions of Ordinance #103.

At a public meeting of the City Council held on May 31, 1977, Plaintiff's preliminary site plans were laid before the City Council by the Planning and Zoning Board with a recommendation of approval. After some discussion about the assessed valuation of the land, one Councilman, Defendant Alfonso Gereffi, indicated some concern with the proposed plans with respect to the condominiums north and west of the proposed development. This concern was as to esthetics. The City Council tabled the matter without taking any further action.

Plaintiff's site plans were again considered at a public meeting of the City Council on June 14, 1977. After much discussion concerning the construction and operation of the mini-warehouse concept between Council members and Steven Corn, the City Council again took

no final action with reference to the preliminary site plans and again tabled the request for approval.

The preliminary site plans were again brought before the City Council on June 21, 1977, at a public meeting. Again there was discussion between Council members and Steven Corn. On this occasion, the discussion dealt generally with the question of access to fire-fighting apparatus into the mini-warehouse property and the other radii necessary for such apparatus if called to respond to a fire within the complex. At the conclusion of this meeting, action on the preliminary site plans was again tabled so that the Council could have further discussion with the Planning and Zoning Board.

Plaintiff's preliminary site plans were finally acted upon by the Defendant, City's Council, at a public meeting on July 12, 1977. However, prior to the July 12, 1977, City Council meeting, the City Council had met with the Planning and Zoning Board. No subsequent recommendation from Planning and Zoning grew out of this joint meeting.

The power of the City of Lauderdale Lakes to re-zone property is subject to Section 25-5.5 of the City Code of Lauderdale Lakes, which provides that:

> "The City Council, by ordinance, from time to time may amend, supplement, change, modify or repeal any existing zoning regulation or restriction in the following manner: The planning and zoning board, as hereinafter provided, shall hold a public hearing in relation to the proposed change, amendment, supplement, modification or repeal at which parties in interest and citizens shall have an opportunity to be

> heard. Notice of such public hearing shall be published at least ten (10) days prior to the date set for said public hearing in a newspaper of general circulation within the city. After said public hearing, the said planning and zoning board shall present to the city council, in writing, its recommendation with relation to the proposed change, amendment, supplement, modification or repeal."

Prior to July 12, 1977, the City of Lauderdale Lakes sent or published no notices to the Plaintiff of any public hearing to be held on the question of whether or not Plaintiff's C-1A property should be re-zoned or that a hearing would be held on any specific re-zoning proposal. In fact, the City of Lauderdale Lakes had made no effort whatever to re-zone Plaintiff's C-1A property from July 12, 1966, to July 12, 1977, a period of 10 years.

Notwithstanding the foregoing lack of notice, the first matter on the Defendant City's Agenda at the July 12, 1977, City Council meeting was a proposal by Defendant Councilman Greenwald eliminating mini-warehouses as a permitted use in the C-1A zoning classifications, Ordinance #548; and another proposal to re-zone Plaintiff's C-1A property to a B-3 classification, Ordinance 549. An Ordinance imposing a building moratorium on Plaintiff's property, Ordinance #552, was also proposed and adopted at a later meeting. An extended discussion took place on the merits of these proposed ordinances. Ultimately, both proposed ordinances were enacted by the City Council.

The evidence establishes that the changes proposed by Ordinances #548, #549 and #552 were sudden and

unexpected after Plaintiff's site plans had already been before the City Council on three separate occasions.

Subsequent to the action on Ordinances #548, #549 and #552, the City Council then considered the preliminary site plans of the Plaintiff. There was no discussion with reference to modifications or changes in the site plans so as to satisfy specific objections by the City Council, nor were there any recommendations made which would have informed the Plaintiff as to what should be corrected. Further, there was no discussion with reference to the requirements of Ordinance #103.

The City Council of Lauderdale Lakes, on July 12, 1977, voted unanimously to deny approval of the Plaintiff's preliminary site plans.

The Court finds from the evidence presented that Ordinances #548, #549 and #552 were enacted by the City improperly and not in accordance with the requirements of the City Charter. Further, the evidence specifically indicates that the City Council was reacting to the demands of the residents of the near-by condominium building (the Amicus Curiae herein) and was attempting to satisfy the demands of these residents without consideration for the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes.

Finally, the Court finds from a review of all of the evidence that the preliminary site plans presented by the Plaintiff with reference to the proposed mini-warehouse/shopping center development contained 3 specific deficiencies. It is the further finding of the Court that these deficiencies were before the City Council, but the City Council did not provide the Plaintiff with an opportunity

to correct the deficiencies in question. The evidence establishes that the City Council was required to give the Plaintiff the opportunity to correct the deficiencies; and when the corrections were made, the Ordinances of the City of Lauderdale Lakes would require the City Council to approve final site plans.

The Court finds that based on the evidence presented, the deficiency areas are as follows:

1. Fire Safety: Specifically, the evidence establishes that the preliminary site plans were approved by the Fire Chief of the City of Lauderdale Lakes. However, it would appear from the expert testimony offered in this area that additional fire hydrants are necessary and that certain parking spaces designated should be removed in order to make the operation of fire-fighting apparatus easier and without hazard. The Court specifically rejects the evidence presented on behalf of the city with reference to the after-the-fact tests concerning turning radii conducted by consulting architects and the City Fire Chief.

2. Parking Space Regulation: The preliminary site plans would appear to be deficient with reference to the elimination of parking spaces to facilitate the access and operation of fire-fighting equipment.

3. Landscaping: It would appear from the evidence that the preliminary site plans were deficient as to landscaping, in that they do not provide a sufficient barrier by way of trees and other shrubery [sic] to protect the appearance and character of the neighborhood and to provide a sufficient separation of this property from the residentially-zoned areas. Further, such barriers would minimize the effects of noise which could generate from

the mini-warehouse area to the surrounding residential property.

Based on the foregoing findings of fact, it is the conclusion of this Court as follows:

1. The Plaintiff has established by competent and substantial evidence, taking into consideration the totality of circumstances which began in 1966, including, but not limited to, his expenditures of money for the C-1A site development. Said expenditures were made in reliance on the actions of the City Council and the ruling of the previously-cited Case Number 69-6829, which did not specifically deal with the C-1A property but did deal with Ordinance #105 which was found to be valid. Based on that finding, it would be inequitable at this time to invalidate Ordinance #105 by approving the action of the City in adopting Ordinances #548, #549 and #552.

Purely aside from the earlier determination, this Court concludes as a result of the evidence in this case that the Plaintiff has made such a substantial change in position in reliance upon the provisions of Ordinances #103 and #105 that it would be inequitable now to permit the City to strip Plaintiff of such rights by virtue of a rezoning of the property. Apart from the question as to precisely how much money Plaintiff has expended in reliance upon these Ordinances, it is clear that Plaintiff has made a substantial physical change in the characteristics of the land in reliance thereon. As the facts demonstrate, Plaintiff took, in effect, virgin land without salient physical characteristics and constructed on it a system of canal waterways which circumnavigate the C-1A property, setting it off and apart from the residentially-zoned

property, so that there was some demarcation or boundary between the separate zoning classifications. This act alone is of such magnitude and character that it would be grossly unfair now to permit the City to change the zoning and to prohibit the Plaintiff from proceeding under the previously-approved development plan.

The City suggests that the result should be otherwise by virtue of the passage of time since the enactment of Ordinance #103 and Ordinance #105 and by virtue of "a change in circumstances" since their enactment. But neither Ordinance #103 nor Ordinance #105 impose a time limitation upon the Plaintiff to carry out the development plans approved by the City of Lauderdale Lakes in 1966. Moreover, the evidence shows that Plaintiff followed an orderly plan of development, using the approved plans, following the City's action in 1966, and there does not appear to have been any undue delay by the Plaintiff in going forward. The absence of either is fatal to the City's contentions. Moreover, the "change in circumstances" which the City contends exists is the presence of the condominium development which the City itself must have foreseen in approving the zoning classification R-4A by enacting Ordinance #105. As indicated before, the land in question was undeveloped in 1966. By approving Plaintiff's plan of development and enacting the Ordinances, the City of Lauderdale Lakes had to foresee that the accomplishment of Plaintiff's plan to development would result in the presence of the condominium residents. Thus, the "change in circumstances" of which the City complains is the very condition which the City encouraged and permitted to occur by virtue of its

approval of Plaintiff's development plans and the enactment of Ordinance #105. Having approved and permitted the circumstance itself to occur, the City cannot now complain that it is such a "change" so as to defeat Plaintiff's right to develop his property in accordance therewith.

The Court further concludes that Ordinances #548, #549 and #552 are invalid and unenforceable because of the failure of the City of Lauderdale Lakes to follow the notice and procedures requirements of its own Ordinance #25-5.5 of the City Code. Further, no competent, substantial evidence was before this Court showing that these Ordinances were enacted as a result of compelling reasons or public health and safety. The record in this case is bare of any evidence which suggests that mini-warehouses are somehow destructive of the public health and safety. In fact, the evidence is to the contrary to the extent that Ordinance #103 and Ordinance #105 specifically permit the construction of such a development on the property.

The Court further concludes that, having established a right to relief, the Plaintiff is entitled to a Final Judgment declaring his rights as to the C-1A zoning and requiring the City of Lauderdale Lakes to approve site plans when the deficiencies previously stated herein are corrected, and ultimately, to issue a building permit.

The Court is not unmindful of the concerns of the residents of the Amicus Curiae, Topaz South Condominium Association, Inc., but cannot be swayed from its responsibility by sympathy and must rely solely on the facts and evidence presented in this cause. For their

benefit, it should be pointed out that if the mini-warehouse complex is eventually constructed, the City of Lauderdale Lakes, through its police powers and its occupational license requirements, can sufficiently protect these residents from the fears which they have evidenced, both at previously-held City Council meetings and by their appearance in this cause.

Based on the above referred to findings of fact and conclusions of law, it is ORDERED AND ADJUDGED as follows:

1. Final Judgment is hereby entered in favor of the Plaintiff, HERMAN CORN, TRUSTEE, and against the Defendants, CITY OF LAUDERDALE LAKES, a Florida Municipal Corporation; HOWARD KRAFT, Mayor of the City of Lauderdale Lakes; ALFONSO GEREFFI, City Councilman; JEROME COHAN, City Councilman; MORRIS KLEIN, City Councilman; LYMAN L. ALLEN, City Councilman; LOUIS GREENWALD, City Councilman, and HARRY KAUFMAN, City Councilman.

2. The Court finds and declares that when the Plaintiff, HERMAN CORN, TRUSTEE, has complied with all valid ordinances and zoning regulations of the City of Lauderdale Lakes precedent to approval of preliminary site plans, the City of Lauderdale Lakes may not disapprove Plaintiff's preliminary site plans for the construction of a mini-warehouse/shopping center development on the property owned by Plaintiff and as more particularly described hereafter.

3. The Court finds and declares that Plaintiff, HERMAN CORN, TRUSTEE, has certain vested rights in the

zoning classification C-1A as applied to the following described property:

> The South 400 feet of the West 1,065 feet of the East 1,165 feet of that portion of the Northeast quarter lying North of the North right-of-way line of Canal C-13; in Section 24, Township 49 South, Range 41 East, in Broward County, Florida,

as applied to such property by Ordinance 105 of the City of Lauderdale Lakes, and that the Defendant, CITY OF LAUDERDALE LAKES, is estopped to deny Plaintiff's rights in such zoning classification.

4. Ordinances #548, Ordinance #549 and Ordinance #552 of the City of Lauderdale Lakes are void and unenforceable as against Plaintiff or the property described in the foregoing paragraph, and such Ordinances may not be used to impair or defeat the ability of Plaintiff to develop the previously-described property in accordance with the permitted uses of zoning classification C-1A.

5. The Defendant, CITY OF LAUDERDALE LAKES, be and is hereby directed to approve preliminary site plans for a mini-warehouse/shopping center development on the property described in the foregoing paragraphs, when the deficiencies set out above are corrected. Following approval of the preliminary site plans, the Plaintiff shall file a detailed and comprehensive set of site plans which comply with #6-44 of the Code of Ordinances of the City of Lauderdale Lakes and #3.41 of the Broward County Zoning Regulations. Thereafter, the Defendant, CITY OF LAUDERDALE LAKES, and Defendant, BEN EIGNER, Chief Building Official, shall issue to

the Plaintiff a building permit in accordance with such site plans.

6. The Court shall retain jurisdiction of this cause and the parties hereto until such time as full compliance has occurred with respect to all of the foregoing provisions.

7. The Court retains jurisdiction of this cause also for the entry of a final judgment taxing costs, upon proper motion.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 20 day of October, 1978.

CIRCUIT COURT JUDGE

Copy to:

P-G. Farmer, Esq.

D-J. Brady, Esq.

A.C.-R. Zimmerman, Esq.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

HERMAN CORN, Trustee,

Plaintiffs,

vs.

CITY OF LAUDERDALE LAKES, et al.,

Defendants.
_____/

CASE NO. 84-6034-CIV-PAINE

ORDER REGARDING MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL JUDGMENT

(Filed Oct. 7, 1991)

This matter comes before the Court upon the above-captioned motion (the "Motion to Amend") (DE 210) filed by Plaintiff, HERMAN CORN, TRUSTEE ("CORN"), to which Defendant CITY OF LAUDERDALE LAKES (the "CITY") has responded (DE 215).

I. Individual Defendants' Liability

As to the individual Defendants, CORN is correct that, by Order dated July 1, 1988, this Court granted a Motion to Dismiss the claims against them (DE 101); neither party noted this fact in its Pretrial Stipulation or during trial, and the Court overlooked it as well. The Findings of Fact and Conclusions of Law will "be amended to accurately reflect the fact that judgment is entered in favor of the Individual Defendants and against

Plaintiff based upon this Court's Order granting the Individual Defendants' Motion to Dismiss, and not because of Plaintiff's failure to sustain its burden of proof at trial as to these Defendants." Motion to Amend at 3-4. The Final Judgment, however, does not state the basis for judgment, and therefore need not be amended.

II. Loan-to-Value Ratio

A. 100% Equity

CORN asserts, without citation to any authority, that "as a matter of law, HERMAN CORN's testimony is not rendered incredible by either the Damage Summary or the Complaint." Motion to Amend at 4 (emphasis added). Credibility is, however, a question of fact, which the Court has resolved.

B. Evidence of Construction Cost

After disavowing the Damage Summary in its entirety, CORN argues, "[a]lternatively," that its recitation of construction costs and loan-to-cost ratios must be accepted by the Court as wholly true. Beyond the sheer chutzpah of this argument, the document upon which CORN now relies was not sufficiently explained during trial to constitute adequate "evidence" of construction costs. For example, the source of the cost and inflation figures was never disclosed.

The Damage Summary was offered, and considered, as proof of a general intent to finance, not a specific evidence of the exact construction costs. CORN, having sworn that he intended to pay cash for the project, cannot

reopen his case to prove both costs and his cost-to-value ratio after-the-fact.

C. Industry Standard

As an additional alternative, CORN argues that the Court "must" accept Ronald Ames' testimony and reject Donald Sutte's. Motion to Amend at 6. This credibility determination will not be revisited.

III. Market Rate of Return

The appropriate market rate of return is likewise a factual matter that has been resolved by the Court.

IV. Valuations of Property, as Restricted

Again, the Court made factual findings as to valuation; CORN raises no arguments that were not previously considered and rejected.

V. Just Compensation Claim

The Court determined that, as to the front portion of the Property, "[o]n July 4, 1978, CORN regained all his sticks in the 'bundle of rights commonly characterized as property.' " Findings of Fact and Conclusions of Law at 32. This determination necessarily means that the CITY had not "gone too far" or taken CORN's property, thus requiring just compensation.

VI. Taking of the Entire Property

CORN herein simply reiterates an argument that has already been rejected.

Conclusion

As the CITY has noted, the Motion to Amend is largely an improper attempt to take a "second bite at the apple." In light of all the foregoing, it is

ORDERED and ADJUDGED that the Motion to Amend and Alter Findings of Fact and Conclusions of Law and Final Judgment is **GRANTED in part and DENIED in part**. The Findings of Fact and Conclusions of Law is hereby amended to accurately reflect the fact that judgment is entered in favor of the Individual Defendants and against Plaintiff based upon this Court's Order granting the Individual Defendants' Motion to Dismiss, and not because of Plaintiff's failure to sustain its burden of proof at trial as to these Defendants. The Motion to Amend is **denied** in all other respects.

DONE and ORDERED in West Palm Beach, Florida, this 7th day of October, 1991.

/s/ James C. Paine
UNITED STATES
DISTRICT JUDGE

Copies furnished:
Andrew Lavin, Esq.
Michael Mattson, Esq.

APPENDIX I

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 92-4548
Non-Argument Calendar

D. C. Docket No. 84-6034-CIV

HERMAN CORN,

Plaintiff-Appellant,
Cross-Appellee,

versus

CITY OF LAUDERDALE LAKES,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

Before HATCHETT, DUBINA and CARNES, Circuit Judges.

JUDGMENT
(Filed Aug. 25, 1993)

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order

of the said District Court appealed from in these causes be and the same is hereby VACATED, and that these causes be and the same are hereby REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 25, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAR -2 1994